Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 435.

IN THE MATTER OF

UNION LEADER CORPORATION,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF AS AMICUS CURIAE FOR THE HAVERHILL GAZETTE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Interest of the Amicus Curiae.

The Haverhill Gazette Company, amicus curiae herein by consent, was the intervenor in the Court of Appeals, by permission of that Court. (See pages 5-6, *infra.*)

Opinions Below, Jurisdiction and Statutes Involved.

See Petition, pp. 1-3. The opinion of the Court of Appeals is now reported at 292 F. 2d 381.

Questions Presented.

I. This case involves the question of the validity, both as to timeliness and as to sufficiency, of an alleged affi-

davit of personal prejudice and of the accompanying alleged certificate of counsel filed by petitioner (allegedly under 28 U.S.C. § 144) in the District Court more than two years after the commencement of the case, *and after liability had been determined adversely to petitioner by the judge against whom the affidavit was filed*, a judge who had offered to disqualify himself in March of 1959, as a result of "attacks" on the judge by petitioner's newspaper, which offer was specifically rejected by petitioner; and where petitioner alleges facts in its affidavit allegedly showing prejudice, which occurred about three months before petitioner filed the affidavit; and where petitioner, knowing such alleged facts, participated in a hearing on a motion for an injunction without any notice to the Court as to alleged prejudice until *after* it had engaged in argument, and heard the estimate of damages of the other side (amicus herein) with reference to the forthcoming trial of damages; and where the principal facts alleged by petitioner in its affidavit relate to whether the judge was personally prejudiced in believing petitioner was seeking, by newspaper attacks, to get the judge to disqualify himself; and whether the judge's statement that this was "contempt" was personally prejudiced.

II. Is the certificate of counsel and therefore the alleged affidavit of personal prejudice fatally defective where the certificate does not state that it is made on the good faith of counsel.

III. Is the remedy of mandamus rather than appeal available to petitioner to attempt to make a trial judge recuse himself by petitioner's filing an affidavit of personal prejudice, which was stricken as untimely and insufficient by the trial judge?

IV. Is the petition herein moot where, since the judgment of the Court of Appeals, the District Court has ap-

pointed a Master and the petitioner never objected formally to such appointment?

Counter-Statement of the Case.

Amicus curiae herein, and intervenor below in the Court of Appeals, The Haverhill Gazette Company (hereinafter referred to as amicus), accepts the "Statement of the Case" as set forth in the petition (pp. 4-7), but with the following additions and corrections:

In the private anti-trust action referred to (Petition, p. 4), civil action No. 59-23-W, which began in January, 1959, after lengthy preliminary proceedings, all parties having waived trial by jury, a lengthy separate trial (pursuant to Rule 42(b) of the Federal Rules of Civil Procedure) was had in November and December, 1959, on all issues raised by the pleadings other than issues of damages in said Civil Action No. 59-23-W before Hon. Charles E. Wyzanski, Jr., as a judge of the District Court of the United States for the District of Massachusetts. The judge found that the said Union Leader Corporation is liable to The Haverhill Gazette Company, under The Haverhill Gazette Company's counterclaim and supplemental counterclaim, for a number of violations of the anti-trust laws; and, after appeal by the Union Leader Corporation to the Court of Appeals for the First Circuit and the denial of a writ of certiorari (No. 658, October Term, 1960, *Union Leader Corporation* v. *Newspapers of New England, Inc., et al.*) and a denial of a petition for a rehearing of such denial, by this Court, there remains to be determined before the said District Court *only the amount of damages to be found,* under said counterclaim and supplemental counterclaim, *against the Union Leader Corporation.*

The District Court (180 F. Supp. 125) and the Court of Appeals (284 F. 2d 582, cert. den. 365 U.S. 833) found petitioner liable to The Haverhill Gazette Company in connection with the operation of its Haverhill newspaper, The Haverhill Journal, for numerous illegal violations of the anti-trust laws, including inducing a group boycott by eight principal Haverhill Merchants of the established Haverhill newspaper, The Haverhill Gazette, owned by amicus; Union Leader Corporation's illegal actions with respect to joint visits by Haverhill Journal advertising solicitors and certain union representatives to Haverhill merchants (the Court of Appeals said Union Leader Corporation's part in these actions demonstrated an intent to exclude competition unlawfully in violation of the anti-trust laws), and numerous illegal advertising discriminations in the Haverhill Journal. As the Court of Appeals put it (Appendix to Petition in No. 658, p. 35; hereinafter: "A.P. 658 p. —), Union Leader Corporation in 59-23-W was "a party who pursue[d] an unlawful course of conduct from the moment it appears on the scene . . ." in Haverhill. Union Leader Corporation had offered the 8 Merchants a guaranty totalling at $1,000,000 over a period of years if and when the Journal, under Loeb's (majority stockholder, and president, and dominant figure of petitioner) ownership and control, became the only newspaper publishing in Haverhill. The Court of Appeals in its opinion on Union Leader Corporation's appeal on this point with respect to the 8 Merchants stated: "We confess an inability to understand the basis of the Union Leader's appeal on this question" (A.P. 658, p. 28). All these violations of U. L. Co. *had put the H. G. Co. in peril of insolvency in the equity sense* (Record in No. 658, p. 1095). (See footnote 14, A.P. p. 30.)

In its statement of the case it is indeed surprising that petitioner does not directly specify what actually took place

on March 14, 1961 (see p. 5 of Petition). The petitioner waited till *after* amicus argued, and *after petitioner itself argued on the merits,* before raising any question whatsoever of alleged personal prejudice of the judge as to matters which had allegedly taken place *years* before (Appendix to Petition, pp. 41-42, and *months* before, R. 5-10, 49-52; A.P. pp. 43-44, p. 26). As the Court of Appeals put it (A.P. p. 27):

> "On March 14, 1961, the court held a hearing on a motion filed by intervenor to enjoin petitioner from encumbering its property so as to reduce its ability to pay damages. Intervenor presented its position, certain comments were made by the court and *petitioner made an argument on the merits. Following this,* petitioner stated that it intended to file an affidavit of prejudice." (Emphasis supplied.)

As to the position taken by amicus, the Court of Appeals, it is submitted, correctly set this forth in its opinion (A.P. pp. 20-21, footnote 4), after permitting an intervention therein "in accordance with our customary practice" and with the "assent" of Judge Wyzanski (A.P. p. 20):

> "Petitioner argues that the fact that intervenor is appearing here shows its belief that the judge is prejudiced in its favor—else, why should it care whether he is disqualified or not? Because this argument may have at least a superficial appeal, we might, in the future, reconsider our practice if a situation arose where an affidavit was filed against a judge before any proceedings had taken place. But where a case, and particularly an antitrust case, has already been tried at length on the merits, the issue of damages, although separate in a sense, is necessarily tied into

matters already heard. Resumption before the same judge would undoubtedly be a simpler, shorter and less costly procedure than it would be to recommence with a new one. Intervenor accordingly has an immediate and legitimate interest to protect."

Amicus believes it properly may be considered as a respondent herein, but has filed this brief as an amicus curiae, with the necessary consents, to avoid at this stage any such question of its status.

Finally, by letter of September 29, 1961, after the petition herein had been filed, petitioner wrote to Mr. Justice Frankfurter (copy to H. G. Co.'s counsel, the Chief Justice, Judge Wyzanski, and the Solicitor General) a letter requesting him to "take no part" in considering or determining the allowance of this present petition, on the ground that Justice Frankfurter is "personally acquainted with both the publisher who ass[redacted] the existence of personal prejudice on the part of the Judge, and with the Judge who denies his prejudice."

"It is our information and belief that Judge Wyzanski has enjoyed a close personal and professional relationship with you [*i.e.*, Justice Frankfurter] which covers a long span of years and this is widely recognized in the First Circuit."

(In petitioner's petition, p. 12, last paragraph, petitioner states that the Court of Appeals erred herein because of its "understandable reluctance [*sic*] to hold that a judge in one of its Districts is both prejudiced and blind to that fact." It would seem that the Court of Appeals is not entitled, in petitioner's opinion, to the assumption that it acts in any case before it, irrespective of who may be the parties before it, impartially.)

Argument.

The Court of Appeals held that the remedy of mandamus was procedurally available in the instant case, but the petition for mandamus would not be granted under the circumstances. Amicus contends in point IV below that an additional ground for supporting the judgment of the Court of Appeals herein is that in fact mandamus was not and is *not* procedurally available to the petitioner herein. The party successful below may of course sustain the judgment below on any ground finding support in the record. *Jaffke* v. *Dunham*, 352 U.S. 280.

I. Untimeliness of Affidavit.

The affidavit was not "timely" as required by the statute (28 U.S.C. § 144).

Petitioner states as follows on this point (Petition, p. 7):

> "There is no issue as to the timeliness of Petitioner's affidavit of prejudice."

Indeed, the Court of Appeals emphasized the fact that petitioner's affidavit was *not* timely in important respects:

> "Petitioner first points to the judge's statement on March 14 that petitioner is 'in the business of attacking me.' The obvious answer to this is that if petitioner did not find the judge disqualified in 1959 for that belief, he did not become so in 1961 because he continued to be of the same opinion. *Nothing is more important in an affidavit than timeliness,* and *its counterpart, waiver.* See In re United Shoe Machinery Corp., 1 Cir. 1960, 276 F. 2d 77, 79; Eisler

v. United States, D.C. Cir., 1948, 170 F. 2d 273, 277, appeal dismissed, 338 U.S. 883. *The statute does not permit second guessing.''* (Emphasis supplied.) (A.P. p. 31.)

Petitioner now concedes that this ''may'' have constituted a waiver as to a ''prejudice'' ''prior to and on May 5, (*sic*—for March 5) 1959'' (Petition, p. 8).

Further, as the Court of Appeals indicated in the part of its opinion (A.P. p. 27) passed over ambiguously by petitioner, and quoted by amicus *supra* at p. 5, the petitioner waited at the hearing on March 14, 1961, to talk about prejudice until *after* petitioner argued on the merits.

The Courts have been very strict where the question of timeliness, as required by the statute, is involved.

In *Eisler* v. *United States,* 170 F. 2d 273 (App. D.C. 1948), appeal dismissed 338 U.S. 883, affiant contended that he did not know that the judge against whom the affidavit was filed was to be assigned to the case until May 20. The original trial date was May 26. Several days prior to that date counsel for affiant requested a continuance of the argument on preliminary motions and of the trial. *Continuance was granted of the trial to May 27, but the motions were argued and disposed of on May 23 by the judge.* On May 23 motion was made for a further continuance on the ground that the brother of chief trial counsel had just died. The continuance was granted until June 4. The affidavit of bias and prejudice was filed on May 29, *nine days after affiant contended that he first knew of the assignment.* The Court of Appeals for the District of Columbia held that the affidavit was untimely. Here the affidavit in 59-23-W was filed ten days *after* the mandate was filed in the District Court. See also *Minne-*

sota & Ontario Paper Co. v. *Molyneaux* (C.C.A. 8, 1934), 70 F. 2d 545, 547.

Petitioner argued below and states or implies here (Petition, pp. 9-10) that it could not file the affidavit until after the mandate came down. *But this is obviously not so;* for the stay of mandate did not stay the injunctions of the District Court or the interpretation of it's partial final decree. As paragraph 12 of the partial final decree states:

> "Jurisdiction of this cause is retained for the purpose of enabling any party to apply to this Court at any time for such further orders and directions as may be appropriate for the correction, construction, or carrying out of this decree." (R. in No. 658, p. 1106.)

The affidavit was completely untimely and defective, since many of the alleged acts of bias and prejudice of which affiant complains are concededly matters arising in December of 1960, months before the mandate came down. The affidavit is further fatally defective because, as the statute requires, no "good cause" is "shown for failure to file it within such time" (*i.e.*, within ten days of the beginning of the term on March 20, 1961).

The affidavit cites various alleged matters on the first four pages and then states with reference to matters allegedly occurring in *December of 1960* (the affidavit of Henry J. Price, Jr., being not sworn to until January 31, 1961):

> "Affiant was told that there was a statute which enabled a litigant to ask a Judge to disqualify himself if he believed sincerely that the Judge was biased for any reason. Affiant suggested to counsel that they record Mr. Price's statement in an affidavit *in case*

such a contingency arose." (Emphasis supplied.) (A.P. p. 44.) (R. 9.)

See *Laughlin* v. *United States,* 151 F. 2d 281 (App. D.C. 1945), cert. den. 326 U.S. 777, where the Court said at page 284:

> "his [affiant's] action therefore, in *deliberately* holding back the filing until after the first day's proceedings and after Judge Bailey had ruled on sundry matters, . . . was not only not a showing of good cause for the delay, but, as the Judge properly held, *a waiver of Appellant's statutory right to a consideration of the Affidavit.*" (Emphasis supplied.)

See also *Refior* v. *Lansing Drop Forge Co.,* 124 F. 2d 440, 445 (C.C.A. 6, 1942), cert. den. 316 U.S. 671, where the Court said:

> "The statute, by its express terms, requires diligence in filing the affidavit of disqualification and does not permit a litigant, after he has knowledge of the alleged bias or prejudice of the trial judge, *and without notice, to go forward in the cause* without filing such affidavit after the facts of disqualification are known to him." (Emphasis supplied.)

See further *Ex Parte Glasgow,* 195 Fed. 780 (D.C. Ga. 1912, affd. *sub. nom. Glasgow* v. *Moyer,* 225 U.S. 420). See also *Callwood* v. *Callwood,* 127 F. Supp. 179, 182-183 (D. Virg. Is. 1954). See also *Faubus* v. *United States,* 254 F. 2d 797 (C.A. 8, 1958), cert. den. 358 U.S. 829, where Governor Faubus was made a party on September 10, the alleged facts of prejudice were known by then, and he waited

nine more days and until one day before hearing to file the affidavit. The affidavit was held untimely.

It was only near the close of a lengthy hearing in March of 1961 and after petitioner's counsel had argued questions of substance and procedure (pages 29 and 30 of a 37-page record of the hearing of March 14, 1961; for counsel's argument see pages 15-29, *passim* (R. 82-84, R. 67-81) (petitioner having been ordered to file this transcript by order of the Court of Appeals of April 10) that Union Leader Corporation's counsel, almost as an afterthought, stated that he would file an affidavit in 59-23-W against Judge Wyzanski: "Mr. Myerson. No. *And there is one other thing I would like to add,* however, that under instruction of my client, we had—*because of our error in judgment* [*these twenty-seven words preceding are represented by asterisks in the affidavit of petitioner*] we had intended, when we thought the mandate of the Supreme Court came down, that we were going to ask your Honor to transfer this case to another judge for any further proceedings." (Emphasis supplied.)

Petitioner indeed waited till "a contingency arose." *It even waited almost to the end of the hearing of March 14, 1961, and* until *after* it had argued on and heard Haverhill Gazette Company's estimate of damages (about $3,000,000 when trebled, see pages 15-16 of March 14 hearing), and waited four days after the mandate came down before raising a word as to alleged bias or prejudice. Why did not the attorneys for the petitioner *at once,* at the beginning of the hearing of March 14, notify the district judge that the petitioner deemed him (allegedly) too biased and prejudiced to hear the matters before him on March 14, 1961? In the words of *Laughlin* v. *United States, supra,* this was "a waiver of [petitioner's] statutory right to a consideration of the affidavit," aside from all other points presented herein.

As the Court of Appeals aptly put it in *In re United Shoe Machinery Corp.*, 276 F. 2d 77, 79 (C.A. 1, Aldrich, C.J., 1960):

> "The requirement of timeliness is of fundamental importance. The . . . affidavit is untimely as a matter of law. . . . One of the reasons for requiring *promptness* in *filing* is that a party knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives. As was said in State ex rel. Shufeldt v. Amijo, 1935, 39 N.M. 502, at. p. 506, 50 P. 2d 852 at page 855: 'a litigant cannot experiment with the judge presiding over the case: . . . We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking decides to take a plunge.'" (Emphasis supplied.)

As to the *Price* affidavit (R. 49 ff.) the following is noteworthy: that Mr. Loeb learned about the alleged incident as early as December 21, 1960, for the "story" appeared in the Journal of that day. *Yet strangely enough the affidavit was not sworn to until January 31, 1961.* Then to withhold this affidavit for *seven more weeks* before its being revealed to the Court speaks for itself. Such action is exactly what has been, as indicated *supra* and on numerous occasions, condemned by our Courts.

Clearly, further, to file an affidavit well over two years after the commencement of a case is not timely; and ten days after the mandate came down after the denial of certiorari is not timely; and to wait till near the ending of the hearing on March 14, 1961, and then announce to the judge *for the first time* petitioner's alleged belief in the judge's prejudice and bias (arising three *months*

and also two years before) and then to wait six days actually to file the affidavit, this is not "timely" as the word is used in 28 U.S.C. § 144. See *Wyant* v. *Brennan* (C.C.A. 4, 1936), 85 F. 2d 920, 921-922; *Chafin* v. *United States*, 5 F. 2d 592, 594, 595 (C.C.A. 4, 1925).

Perhaps the most important reason as to why the affidavit should have been stricken is the admitted fact (A.P. p. 42 (R. 7)) that Judge Wyzanski *specifically offered on March 5, 1959*, to remove himself from the case even though he was "not the slightest bit affected by editorials" published in Union Leader Corporation's Manchester newspaper, but this offer was *specifically and almost fulsomely* rejected at that very hearing by Union Leader Corporation, Mr. Loeb being present in the courtroom:

> "The Court: And I didn't really know that newspaper had anything to do with this, and I don't read the material and I don't know what they say. *But I do think it is appropriate for me to put on the record that I now for the first time am aware that this is a newspaper which has been engaged in some kind of attack on me. For what, I don't know. Not that I shouldn't be attacked, but I don't read the attacks.*
>
> "*Mr. Bloomberg: For the record, what you say is true. We have discussed this. We will not continue on it, because if I say what I said to my client it might be interpreted as attempting to compliment the court.*" (Emphasis supplied)

(Petitioner surprisingly originally neglected to quote *in full* from the transcript of the March 5, 1959, hearing in its affidavits. The Haverhill Gazette Company, in accordance with the Court of Appeals order of April 27, 1961, included in *its* record appendix the *full* text of the

hearing on this particular point (R. Supplement, added to record herein by agreement of parties). For this reason alone, the affidavit was defective, as the petitioner has thus specifically *waived* any point as to bias or prejudice over two years ago. See *Neal* v. *United States*, 205 F. 2d 121, 125 (C.A. 9, 1953).

This is especially true when it is noted that the judge's words "the business of attacking me" on March 5, 1959, are exactly the same five words as used by the Court over two years later, at the March 14, 1961, hearing. *Petitioner not only did not find them to show prejudice in 1959, but his counsel in effect praised the Court, at that time:* ". . . if I say what I said to my client it might be interpreted as attempting to compliment the court."

Can a party insist, when a judge offers to disqualify himself, that he has full confidence in the Court's fairness and lack of prejudice, wait over two years, and *then*, on matters involving the same subject matter, the petitioner's newspaper articles, insist that the judge disqualify himself? Clearly a party may not so misuse the statute.

II. The Affidavit was Not "Sufficient."

The affidavit was not "sufficient," in the words of the statute (28 U.S.C. § 144).

In alleging prejudice against Judge Wyzanski the affidavit neglects to point out that Judge Wyzanski, over the strenuous objections of The Haverhill Gazette Company, found that The Haverhill Gazette Company had committed illegal advertising discriminations and enjoined it from attempts to monopolize and issued against it the strict requirements of paragraphs 2 and 9 of the partial final decree. These parts of Judge Wyzanski's opinion and decree were reversed by the Court of Appeals, which found in favor of The Haverhill Gazette

Company on this issue, and this Court denied certiorari when Union Leader Corporation, as petitioner, filed a petition for certiorari in this Court. How could the district judge be personally biased against the Union Leader Corporation or Mr. Loeb, its president, when, in an important point in the case, the district judge found in favor of Union Leader Corporation and not against it? See *Kelly* v. *New York, New Haven, & Hartford Railroad Co.*, 139 F. Supp. 319 (D.C. Mass. 1956). (See A.P. p. 30, footnote 14.)

It is respectfully submitted that petitioner's affidavits and exhibits show on their face something less than that "fearless" and "honest" reporting, not "withholding any facts" which petitioner's affidavits set forth. Even assuming that the rule of law under the *Berger* v. *United States* (255 U.S. 22) case is that what is set forth in the exhibits must also be considered by the judge to be true, the affidavits and exhibits disclose: That Price called the judge at his home at 8 a.m. on December 21, went to his (the judge's) office at 9:20 a.m. the same day; at about 9 a.m. on December 22 he went to the judge's office, and again he went on the 29th and the 30th. That the judge expressed irritation at this is not the personal bias and prejudice of which the statute speaks, nor is the fact (assuming again the above rule of law applies) that *the judge believed the articles were aimed at getting him to disqualify himself.* For, even assuming the purity of petitioner's purposes, the articles, taken in connection with what may fairly be called the harassment by Price beginning by telephone calls at 8 a.m. at the judge's house and continuing to the judge's chambers to obtain something "more productive" (R. 49) (page 1 of Price affidavit) (*i.e.*, "additional fodder for an affidavit of prejudice"—A.P. p. 32) on their face show that it *was quite reasonable for the judge to assume that the petitioner's purposes* were less than pure and not merely

concerned with "factual" matters. Examples: (Exhibit 5) "State Paid Wyzanski Heirs at Higher Rate" (1/3/61). "Wyzanski Blasts Press In Boston" (1/6/61). "Controversial Property" (pictures on 1/5/61). There are numerous others.

If a judge honestly states that articles that he very *reasonably* construes as attacks (and the long history of the Union Leader Corporation comments on Judge Wyzanski must be kept in mind in this respect) (see Exs. 1-5) (and note the admission of petitioner's then counsel back at the March 5, 1959, hearing, quoted *supra,* p. 13: The Court: "Not that I shouldn't be attacked but I don't read the *attacks.*" Mr. Bloomberg: "*For the record, what you say is true*" (emphasis supplied)) are, he believes, under all the circumstances intended to get him to disqualify himself in a case *after liability has been determined adversely to the petitioner,* this is not that personal bias and prejudice of which the statute speaks. See *Eisler* v. *United States* (App. D.C.), 170 F. 2d 273; *Keown* v. *Hughes* (C.C.A. 1, 1920), 265 Fed. 572. Particularly is this so when petitioner had ample warning that the judge, back in 1959, construed petitioner's articles as *attacks* and felt that petitioner was "in the business" of attacking him and offered to disqualify himself voluntarily.

For the statute could not have been intended to make a judge disqualify himself, even though he had no bias or prejudice whatsoever, in a case where in fact the affiant did intend by his own attacks to disqualify the judge or the judge could reasonably believe this to be the fact. The rule of the *Berger* case, it is submitted, obviously cannot be extended to cover such a situation.

Further, the fact that a judge believes (even if the judge is wrong) that actions of a litigant are in contempt of Court, or close to contempt, *does not show the personal*

bias and prejudice of which the statute speaks. If this were so, every judge who holds a party in a case before him in contempt, or warns of possible contempt, is guilty of personal bias and prejudice. This of course is not so. See *Foster* v. *Medina*, 170 F. 2d 632 (C.C.A. 2, 1948), cert. den. 335 U.S. 909 (1949) and the related case, *Sacher* v. *United States*, 343 U.S. 1 (1951). (See *Goldfine* v. *United States*, 268 F. 2d 941, 947 (C.A. 1, 1959), cert. den. 363 U.S. 842).

Judge Medina held one of the defendants and some of the attorneys for the defendants in contempt. When a judge holds a party in contempt of Court, or speaks of the party's actions in *connection therewith* as "contemptible" or "reprehensible," this is to uphold the dignity of the law. It is not "personal" bias, hatred, animosity, contempt or prejudice. It clearly does not render the judge unfit to sit further on the principal case.

Indeed, in *Henry* v. *Speer*, 201 Fed. 869 (C.C.A. 5, 1913), the affidavit of bias was based upon a statement of the judge delivered to the newspapers "in which practically every issue is prejudged and determined by the said judge" (p. 870). This affidavit, said the Circuit Court, did not "tend to show the existence of a personal bias or prejudice on the part of the judge towards petitioner but rather a prejudgment of the merits of the controversy and against deponent's right to recover. Section 21 [now 28 U.S.C. § 144] is not intended to afford relief against this situation." Prejudgment alone is thus insufficient under the federal statute. See *In re Lisman*, 89 F. 2d 898, 899 (C.C.A. 2, 1937).

Such "prejudgment" of petitioner's "contempt" or attempted contempt herein (*if* it *was* made by Judge Wyzanski) does not indicate the "personal" prejudice within the meaning of the statute.

Even if the judge in a case is in error in thinking a party before him is guilty of contempt, that does not mean that he should not sit on the principal case. That does not constitute the "personal" bias and prejudice of which the statute speaks; for the judge is clearly acting in a judicial capacity, not with "personal" prejudice.

For any statement by a judge that indicates his concern (as is his duty) with the upholding of the dignity of the Court, and the law, such as in the instant case, is a *judicial utterance* affecting the performance of his duties and does not show "personal" prejudice. The "contempt" referred to in the affidavit, the "contemptible" and "reprehensible" taken in context, relate clearly to possible judicial contempt, not to any "personal" animosity or prejudice.

Thus the statute (28 U.S.C. § 144) may not be used to frustrate its very purpose. For, *if* petitioner and Loeb *were* seeking to get the judge to disqualify himself by their attacks, it was indeed a very flagrant contempt of court (*petitioner has so conceded*—see A.P. p. 31), and, if the judge *reasonably* believed this, and thought this was "reprehensible," "contemptible" and therefore contemptuous of the Court, or "contempt," this is not the "personal prejudice" within the statute. But, at any rate, it is submitted that the petitioner's actions, and Loeb's actions, in the light of all the circumstances, not only could lead the judge reasonably to believe as he did, *but actually, fairly interpreted, show such an improper intent on the part of petitioner. And why did petitioner wait till almost the end of the March 14 hearing to raise the "prejudice" point?* (See *Walker* v. *United States,* 116 F. 2d 458, 460-461, 462 (C.C.A. 9, 1940). See also *United States* v. *Fujimoto,* 101 F. Supp. 293, *infra,* p. 19; *Keown* v. *Hughes,* 265 Fed. 572, 577-578 (C.C.A. 1, 1920). See also

Allen v. *DuPont* (D. Del. 1948), 75 F. Supp. 546, 548 (party brought suit against judge personally).)

Contempt actions, the Courts have always pointed out, are to vindicate the authority and dignity of the Court. It is not a "personal" matter.

Quite different is the *Berger* case (*Berger* v. *United States*, 255 U.S. 22, 1921). There the affidavit stated that the judge said (at p. 28): "One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty." The defendants had been indicted for an illegal violation of the Espionage Act of 1917. This Court held that the remarks made by the judge "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment" (255 U.S. at 33-34).

In *United States* v. *Fujimoto*, 101 F. Supp. 293, 296 (D.C. Hawaii, 1951) (*motion for leave to file petition for writ of prohibition or mandamus denied, Fujimoto* v. *Wiig, U.S. District Judge*, 344 U.S. 852), the District Court said:

> "Only a psychic pleader could allege that because a defendant has published uncomplimentary statements concerning a judge, the latter will be unable to give his critic a fair and impartial trial. If such a *fantastic procedure* were permitted, a defendant could get rid of a judge by the simple expedient of publishing a scurrilous article, *truthfully* alleging the article was published, and clinching the matter by asserting the bald conclusion that, since the article was uncomplimentary, the judge must of necessity be prejudiced against the publisher.
>
> "It is precisely to such bizarre pleading that the admonition in the *Fairbank* case, *supra*, applies; namely, that Congress did not intend 'that any reason

> that a litigant may choose to assign in his affidavit, however absurd or ridiculous in point of law or morals, will disqualify the judge'." (Emphasis supplied.)

Cf. affidavit (A.P. pp. 44, 45) (R. 9): "The Court . . . but I haven't attacked your client . . ." "The Court . . . your client . . . trying to create a prejudice *not on my part* but with respect to the case." (Emphasis supplied.)

Cf. Frank, J., in *In re J. P. Linahan,* 138 F. 2d 650, 653, n. 13 (C.C.A. 2, 1943):

> "There would have been no disqualification of the trial judge in Berger v. U.S. 255 U.S. 22, if he had said, not that he was virtually incapable of being fair to German-American citizens during World War I, but that he was aware of his prejudice and could therefore discount it.
>
> "The unrecognized, unspoken bias is dangerous."

But "*anything less than the personal animosity* toward a party illustrated by the Berger case has been held not enough to indicate the 'personal bias or prejudice' required by the federal statute" (11 Pittsburgh Law Review, 415, 419, "Disqualification for Bias" (1950). (Emphasis supplied.) See, for examples, the following cases: *Baskin* v. *Brown,* 174 F. 2d 391 (C.C.A. 4, 1949); *Hurd* v. *Letts,* 152 F. 2d 121 (App. D.C. 1945) (application for leave to file petition denied); *Price* v. *Johnston,* 125 F. 2d 806 (C.C.A. 9, 1942), cert. den. 316 U.S. 677 (1942); *Walker* v. *United States, supra,* 116 F. 2d 458 (C.C.A. 9, 1940); *Ryan* v. *United States,* 99 F. 2d 864 (C.C.A. 8, 1939), cert. den. 306 U.S. 635 (1939); *Craven* v. *United*

States, 22 F. 2d 605 (C.C.A. 1, 1927), cert. den. 276 U.S. 627 (1928); *In re Beecher*, 50 F. Supp. 530 (D. Wash. 1943); *United States* v. *16,000 Acres of Land*, 49 F. Supp. 645 (D. Kan. 1942); *United States* v. *Buck*, 23 F. Supp. 508 (D. Mo. 1938), appeal dismissed, 102 F. 2d 976 (C.C.A. 8, 1938); *Johnson* v. *United States*, 35 F. 2d 355 (W.D. Wash. 1929).

The numerous and flagrant violations of the anti-trust laws by petitioner, the attempts to monopolize of petitioner that "had put [the Gazette] in peril of insolvency in the equity sense" (A.P. in No. 658, p. 32), a finding specifically affirmed by the Court of Appeals in its opinion in No. 658, the withholding of any mention of prejudice by petitioner for months and until after amicus had presented its damage estimate and petitioner argued, and near the close of the March 14, 1961, hearing—all these factors and all the surrounding circumstances, including the bringing of a groundless anti-trust suit by petitioner against the amicus and others, the petitioner also knowing that *it* was the one engaging in illegal anti-trust violations and in a secret conspiracy; including all the actions of Price and Loeb, including the specific rejection of the judge's offer to disqualify himself *before* the case was tried and the petitioner found liable—all these certainly constitute the pertinent background and facts under which the judge reasonably, and, it is submitted, correctly, assumed that the petitioner's actions constituted "a contempt of which this Court has chosen, *so far*, to take no action" (A.P. p. 45) (R. 9).

The Court of Appeals well summarized this point in holding (A.P. p. 32):

> "A judge's reasonable belief that a party was acting with a purpose of disqualifying him, his conclusion that such action was contemptuous and repre-

> hensible, and even a very considerable showing of irritation, is in no way equivalent to personal bias and prejudice." See *Baskin* v. *Brown*, 4 Cir., 1949, 174 F. 2d 391, 394; *Foster* v. *Medina*, 2 Cir., 1948, 170 F. 2d 632, 633, cert. den. 335 U.S. 909; *Saunders* v. *Piggly Wiggly Corp.*, D.C.W.D. Tenn., 1924, 1 F. 2d 582, 585; cf. *In re Lisman*, 2 Cir., 1937, 89 F. 2d 898, 899."

As for the judge's statement that he "so far" had chosen to take no action, the petitioner obviously cannot reasonably complain that the judge's wanting to give petitioner another chance before he took contempt action constitutes "personal prejudice" (see A.P. p. 34).

Finally, the opinion of the Court of Appeals, it is submitted, clearly demonstrates that there was no personal prejudice shown on April 26, 1961 (A.P. pp. 34-35).

There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is. See *Tucker* v. *Kerner*, 186 F. 2d 79, 85 (7 Cir. 1950); *Sanders* v. *Allen*, 58 F. Supp. 417, 420 (D.C. S.D. Cal. 1944), appeal dismissed, 151 F. 2d 534 (9 Cir. 1945). The "public respect" for the Courts (Petition, p. 16) is not enhanced by upholding insufficient, untimely and defective affidavits of prejudice.

All the cases show that a judge must be presumed to be qualified and there is a heavy burden on the affiant to show grounds for believing the contrary. The affiant, if it cannot so show—and it has not—still has its protection if personal bias or prejudice appears in fact during the trial on damages. Compare *Knapp* v. *Kinsey*, 232 F. 2d 458 (C.A. 6, 1956), and *Killilea* v. *United States*, 287 F. 2d 212 (C.A. 1, 1961), cert. den. 366 U.S. 969.

The trial on damages should proceed with no further delay.

III. The Certificate of Counsel, and therefore the Affidavit, is Defective.

The affidavit herein has annexed a certificate of counsel stating that the affidavit "is made in good faith by the Union Leader Corporation and by William Loeb on its behalf" (A.P. p. 47).

On this point the Court of Appeals in effect held the certificate and therefore the affidavit insufficient, but only as an interpretation made "prospectively."

It is submitted that the ruling on the insufficiency of the certificate should also be applied to this case. See *Jaffke* v. *Dunham*, 352 U.S. 280.

All Courts agree that the certificate has indispensable value (see cases cited at A.P. p. 21).

As the Court of Appeals put it (A.P. p. 22):

> "It would seem meaningless to ask a lawyer to certify that his client believed an affidavit to be legally sufficient while thinking it frivolous himself." See Federal Rules of Civil Procedure, Rules 11 and 56(g), 28 U.S.C. See also *Craven* v. *United States* (C.C.A. 1, 1927), 22 F. 2d 605, 607, cert. den. 276 U.S. 627.

Counsel for petitioner did not see fit to state in the certificate that it was made in good faith *by counsel*. The certificate (and therefore the affidavit) was fatally defective.

IV. Petitioner's Procedure Below was Fatally Premature and Defective.

It is respectfully submitted that *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, is distinguishable, since there all *parties desired* the judge to sit on the case and *not* to refer it to a master. Here petitioner seeks the district judge's disqualification for bias and prejudice.

The majority (five to four) opinion of this Court in the *La Buy* case stated:

> "It is true that mandamus should be resorted to only in extreme cases, since it places trial judges in the anomalous position of being litigants without counsel other than uncompensated volunteers." 352 U.S. at 257-258.

Thus the "unusual" and "extreme" circumstances were limited by this Court to cases where there was "clear abuse of discretion or 'usurpation of judicial power'" (352 U.S. at 257).

Neither is present here. At most the petitioner might claim that the judge erred in construing the affidavit and in his ruling upon it, in the light of the statute. Petitioner must wait for his regular appeal. To hold otherwise would, it is respectfully submitted, open the door to all kinds of interlocutory mandamus procedure. This, it is submitted, was not the intention of this Court (352 U.S. at 255). See *Ex Parte American Steel Barrel Co. & Seaman,* 230 U.S. 35, at 45.

In *Albert* v. *United States District Court,* 283 F. 2d 61, 62-63 (1960), cert. den. (1961), 365 U.S. 828, the Court of Appeals, Sixth Circuit, correctly, it is submitted, reviewed the cases and held as follows:

> "*The order entered by the District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case. . . .*
>
> "*Mandamus does not lie to compel a judge of an inferior court to reverse a decision made by him in the exercise of a legitimate jurisdiction. . . . This remedy is reserved for really extraordinary cases. It may not be used as a substitute for appeal.* Roche v.

Evaporated Milk Association, 1943, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185; Beneke v. Weick, 6 Cir., 1960, 275 F. 2d 38.

"The writ may be granted only where it is clear and undisputable that there is no other legal remedy. Ex parte American Steel Barrel Co., 1913, 230 U.S. 35, 33 S. Ct. 1007, 57 L. Ed. 1379.

"*Mandamus has been held not to be the proper remedy to compel a judge to recuse himself.* Green v. Murphy, 3 Cir., 1958, 259 F. 2d 591; Korer v. Hoffman, 7 Cir., 1954, 212 F. 2d 211, 45 A.L.R. 2d 930; Hurd v. Letts, 1945, 80 U.S. App. D.C. 233, 152 F. 2d 121." (Emphasis supplied.)

See also *Green* v. *Murphy*, *supra*, 259 F. 2d 591, at 594, n. 4 (C.A. 3).

Appeal, not mandamus, was the proper procedure for petitioner to follow.

V. The Petition is Moot.

Irrespective of all other points, Judge Wyzanski on July 13, 1961, appointed a Master to hear damages, and set a date for the hearings to commence (A.P. pp. 49-51). The parties have already appeared before the Master (Petition, p. 15). Petitioner has recently filed a "Reply" to the schedule of damages of amicus and has submitted a "Preliminary Economic Evaluation." No written formal objection has been made or filed by the petitioner to such appointment. If, as petitioner alleges, Judge Wyzanski was too "personally prejudiced" to proceed with the case, why did petitioner not make some written formal objection to the order of the judge appointing Professor Bok as Master? (A.P. p. 50).

The petition is therefore moot and should be dismissed.

Conclusion.

For all the above reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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